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E. C. BURKS, Bedford City, Va.....EDITOR.
C. A. GRAVES, Washington & Lee University, Lexington, Va., } ASSOCIATE
W. M. LILE, University of Virginia, Charlottesville, Va., } EDITORS.

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MISCELLANEOUS NOTES.

THE failure of a person to turn to the right, as required by statute, on meeting another in a highway, is held in the Iowa case of *Reipe v. Elting*, 26 L. R. A. 769, not to be conclusive evidence of negligence, notwithstanding the statute—especially where he was on horseback.

ACTS OF THE LEGISLATURE.—We shall endeavor to publish in the REGISTER the Acts of the Legislature of a general nature, or abstracts of them, as soon as the Acts can be obtained, during the legislative session. These Acts are usually made to take effect from their passage—a most pernicious practice—*malus usus et abolendus est.* According to the theory, everybody is conclusively presumed to know what the law is—*ignorantia legis neminem excusat* is the maxim. And yet, obedience is exacted when the means of knowledge are withheld. This is most unreasonable. We publish several of the recent Acts in this number.

RUFUS W. PECKHAM.—President Cleveland, on Tuesday last, nominated Rufus W. Peckham, of New York, to be an Associate Justice of the United States Supreme Court, to succeed the late Howell E. Jackson, of Tennessee. The Peckham family, of New York, have furnished excellent judicial timber for the bench. We regard the nomination of Mr. Peckham as a good one. He was born in Albany about fifty-eight years ago, graduated from the Albany Academy at the age of eighteen, and after three years' study in the law office of Cott & Peckham, was admitted to the bar. He subsequently became a member of the firm, and was afterwards its head.

He was made District Attorney of Albany county in 1869. In the well-known case involving the taxation of banks, which came before the United States Supreme Court in 1881, he was successful over Senator Edmunds, the opposing counsel. He was at one time Corporation Counsel of Albany, and in 1883 was elected to the Supreme Court Bench for a term of fourteen years. His father, Rufus W. Peckham, now dead, was a judge of the Court of Appeals. The present judge was elected on the Democratic ticket, and he has always been a con-

spicuous member of that party. He served as the president of the Albany County Democratic committee for several years, and was a notable figure at nearly all the Democratic State and National conventions for a long time prior to his election to office, in 1886.—*Chicago Legal News.*

Judge Peckham's nomination has been ratified by the Senate.

CRUELTY TO ANIMALS.—*Unique indictment.* A correspondent sends us, as a precedent, the following copy of an indictment preferred by a Commonwealth's Attorney to a grand jury of one of the counties of Southwestern Virginia. The names are fictitious:

"Virginia, X—— County, to-wit: The Grand Jury in and for the county of X——, empanelled and sworn in the county court of said county, upon their oaths present, that Joseph Smith of the said county, within the jurisdiction of the said court, on the third day of August, 188–, in the said county, upon a certain camp-ground, in and upon a certain gray mare, the property of John Williams, unlawfully, willfully, deliberately, feloniously, and of his malice aforethought, did make an assault, and the hair on the tail of the said gray mare did then and there unlawfully, willfully, deliberately, feloniously, and with malice aforethought, cut and trim, to the great damage of the said gray mare, it being then and there fly-time, against the peace and dignity of the Commonwealth of Virginia."

It is said that the grand jury ignored the bill; and "it goes without saying" that the members of the said grand jury did not, nor did any of them, nor did either one of them, belong to that humane institution recently incorporated under the name and style of "The Society for the Prevention of Cruelty to Animals"—(cited S. P. C. A.)

The "said gray mare" came off rather better than Tam O'Shanter's

"gray mare, Meg,
A better never lifted leg";

but who will say that, although she did not lose her tail by some Nannie of the "cutty-sark," as Tammie's mare did, she was not, nevertheless, in the language of the statute in such case made and provided, "ill-treated" while in pious attendance on the camp-ground? Imagine, too, *inter alia enormia*, after leaving that camp-ground, what a ludicrous figure she would have cut at Polk Miller's "Huckleberry Pic-Nic"; and how uncomfortable, also, she would have been—particularly "in fly time."

Is it to be understood, that a "gray mare" on the "camp-ground" "has no rights which a white man is bound to respect?" This is a grave question.

BARBERS, according to the Supreme Court of Georgia, are baillees for hire, and responsible for their customers' hats while they enjoy their shave. Against this ruling, Bleckley, C. J. (now Ex.), protests in his usual quaint way, which our Judge Gary, of the Appellate Court, cannot successfully overtop. The barbers will canonize the Chief Justice for the following dissent:

"It hath never happened, from the earliest times to the present, that barbers, who are an ancient order of small craftsmen serving their customers for a small fee, and entertaining them the while with the small gossip of the town or village,

have been held responsible for a mistake made by one customer whereby he taketh the hat of another from the common rack or hanging place appointed for all customers to hang their hats; this rack or place being in the same room in which customers sit to be shaved. The reason is that there is no complete bailment of the hat. The barber hath no exclusive custody thereof, and the fee for shaving is too small to compensate him for keeping a servant to watch it. He himself could not watch it, and at the same time shave the owner. Moreover, the value of an ordinary gentleman's hat is so much, in proportion to the fee for shaving, that to make the barber an insurer against such mistakes of his customers would be unreasonable. The loss of one hat would absorb his earnings for a whole day; perhaps many days. The barber is a craftsman laboring for wages, not a capitalist conducting a business of trade or trust."—*National Corporation Reporter.*

COMPETENCY OF INFANT WITNESS.—In *Isaacs v. U. S.* (U. S. Supreme Court, Nov. 11, 1895), it was held that a child five and a-half years old was not necessarily incompetent to testify as to the circumstances of a homicide which occurred when he was four years and eleven months old. Mr. Justice Brewer delivered the following opinion on this point:

"The remaining objection is to the act on of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a-half years of age. The boy, in reply to questions put to him on his *voir dire*, said among other things that he knew the difference between the truth and a lie: that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to 'tell no lie,' and in response to a question as to what the clerk said to him, when he held up his hand, he answered 'don't you tell no story.' Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

"That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities.

In *Rex v. Brasier*, 1 Leach, C. C. 199, it is stated that the queston was submitted to the twelve judges, and that they were unanimously of the opinion 'that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court.' See also, 1 Greenl. Ev. sec. 367; 1 Whart. Ev. secs. 398–400; 1 Best. Ev. secs. 155, 156; *State v. Juneau*, 24 L. R. A. 857, 88 Wis. 180; *Ridenhour v. Kansas City Cable R. Co.* 102 Mo. 270; *McGuff v. State*, 88 Ala. 147; *State v. Levy*, 23 Minn. 104, 23 Am. Rep. 678; *Davidson v. State*, 39 Tex. 129; *Com. v. Mullins*, 2 Allen, 295; *Peterson v. State*, 47 Ga. 524; *State v. Edwards*, 79 N. C. 648; *State v. Jackson*, 9 Or. 457; *Blackwell v. State*, 11 Ind. 196.

"These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

"We think that under the circumstances of this case the disclosures on the *voir dire* were sufficient to authorize the decision that the witness was competent, and, therefore, there was no error in admitting his testimony."

ACTIONS FOR PERSONAL INJURIES—REVIVABILITY—STATUTE OF LIMITATIONS.—Section 2906 of the Virginia Code of 1887 originally read as follows:

"Where an action is brought by a party injured, for damage caused by the wrongful act, neglect or default of any person or corporation, and the party dies pending the action, *and his death is caused by such wrongful act, neglect or default*, the action shall not abate by reason of his death, but his death being suggested, it may be revived in the name of his personal representative, *and the declaration and other pleadings shall be amended so as to conform to an action under sections 2902 and 2903, and the case proceeded with as if the action had been brought under the said sections.*"

The purpose and meaning of these provisions are plain. The object was to hold a defendant liable in damages for causing the death of the plaintiff, where the death occurred after action brought, in precisely the same manner and to the same extent as if the action had been brought by the personal representative in the first instance. If the defendant wrongfully caused the death of the decedent, he was to be held to precisely the same liability, and the decedent's family and estate were to have precisely the same relief, whether death occurred before or after action brought. Where death occurred after the action was brought, the pleadings were amended, and the proceeding was made to conform to an action brought originally for causing death. That is to say, the damages were limited to $10,000,

and did not necessarily become a part of the decedent's estate; they were to be distributed amongst his family as the jury might direct, or else according to the statute of distributions. It was only in case there was no husband, wife, child or parent, that the recovery became assets in the hands of the personal representative.

Nor did the section make any other actions thus conditionally revivable than those for personal, corporal injuries—since the action was not revivable unless death was caused *by the injuries*. The action was not made revivable generally.

The legislature of 1893-4 saw fit, however, to amend the section quoted above, whereby its object is wholly altered, and an effect is given to it far beyond what would seem to be consistent with either good sense or sound policy. (Acts 1893-4, p. 83.) The changes made are in the omission of the clauses italicised in the section as already quoted. That is, (1) The action is made revivable whether the plaintiff die by reason of the injuries complained of in the action or not; and (2) The pleadings are not amended to conform to the proceedings under sections 2902-3 to recover damages for wrongful death—commonly known as Lord Campbell's Act.

The effect of these alterations is both curious and startling. For example:

(1) The original section was clearly confined to corporal injuries—injuries which may cause death. But the amendment is broad enough to apply to actions for injuries of every character and description; as well to actions for slander, libel, malicious prosecution, etc., as to those for corporal injuries. If this be so, then when the plaintiff in an action for slander dies, the action may now be revived and proceeded with, in the name of his personal representative! We are sure such a proposition will startle the bar of the State. Perhaps the court would read the section along with previous sections of the same chapter, and confine its operation to actions for personal, corporal injuries. *Sed quere!* Howsoever this may be, it seems clear that all actions for the latter class of injuries—*i. e.* for corporal injuries—are revivable under the amendment in question, regardless of the cause of death.

(2) What is the effect upon the statute of limitations, of thus making such actions unqualifiedly revivable? Section 2927 of the Code provides, in substance, that all revivable actions shall be barred in five years, while those not so revivable shall be barred in one year. Until the pernicious amendment above referred to, it was generally conceded that under our statute of limitations, all actions for personal injuries, whether corporal or otherwise, were barred after one year, being of the non-revivable class. See 4 Minor Inst. (3d ed.) 614. This amendment renders a new and large class of actions revivable, as shown. Is not its effect, then, to place actions for personal, corporal injuries in the category of those barred after *five* years, instead of those barred in *one* year? There seems to be no escape from this conclusion. If in an action for such personal injuries—cutting off a leg, for example—brought four years after the injury, the defendant should plead the one year statute of limitations, it seems clear that the plea would be insufficient. Section 2906, as amended, declares that such an action is revivable, regardless of the cause of death—and section 2927 declares that revivable actions may be brought within five years. And if actions of slander, libel, malicious prosecution, etc., are revivable, as suggested, they are likewise barred only after five years.

(3) By omitting the provision that upon revival of the action the pleadings shall be amended so as to conform to an action under sections 2902-3, the result is that the recovery under this section, by the personal representative, is unlimited, save by the amount claimed in the original declaration and by the discretion of the jury; nor are the damages recovered distributable directly to the family of the deceased as the jury or the statute of distributions may prescribe, but they become a part of the decedent's estate, and of course subject (as we presume) to the payment of his debts.

In other words, if the injured person *himself* brings the action and dies, his recovery is unlimited—the damages are assets for creditors—and he has five years within which to bring his action. If he die before action brought, the *personal representative* can under no circumstances recover more than $10,000—the recovery is for the benefit of the decedent's family, if he has one—and the action is barred unless instituted within twelve months from death.

Can there be any good reason for making so vast a difference between the two cases? If A and B are mortally injured in the same railroad accident, through the carelessness of the railroad company, and A at once institutes his action for $50,000, and on the third day both die of their injuries—why should A's representative be entitled to recover the full $50,000, and B's be limited to $10,000? Or why should B's family be protected in the enjoyment of the recovery in his case, and A's family be denied similar protection against creditors? Or, again, if A survives and B dies—why should the former have five years within which to bring his action, and the latter's representative be limited to one?

We cannot believe the legislature saw the far-reaching effect of such legislation. Certainly some change is called for. We see no reason why the section should not be restored just as it was when it left the Revisors' hands. We call attention to it now, while the legislature is in session, in the hope that it may not be left in its present unsatisfactory shape.

JUDICIAL DECISION AS IMPAIRING OBLIGATION OF CONTRACT.—In the case of *Central Land Co. v. Laidley*, decided by the Supreme Court of the United States, June 3, 1895, it is held that the constitutional prohibition against impairing the obligation of contracts, applies to such impairment by the legislative power of the State, and not by judicial decision only.

The appellate jurisdiction of the Supreme Court was invoked on the ground that the plaintiff in error, a corporation, had acquired title to certain property in West Virginia in reliance upon previous decisions of the Supreme Court of Appeals of that State in construing a certain statute, and that the latter court, by an adverse decision in the plaintiff's case, had changed the settled construction of the statute and thereby impaired the obligation of the contract.

Mr. Justice Gray, in delivering the opinion of the court, denying the jurisdiction, said:

"In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it

must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only.

"The appellate jurisdiction of this court, upon writ of error to a State court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature, alleged to be repugnant to the Constitution of the United States, has been decided by the State court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the State court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the State has erred in its construction of the statute."

The court distinguishes, or undertakes to distinguish, the line of cases beginning with *Gelpcke v. Dubuque*, 1 Wall. 175, in one of which such language as this is used: "The exposition given by the highest tribunal of the State must be taken as correct so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. . . . The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it": *Pittsburg v. Louisiana*, 105 U. S. 278. And again: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, *and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment*": *Douglas v. Pike Co.*, 101 U. S. 686.

The distinction made between the present case and the cases just referred to is that in those cases "the decision of the State court gave effect to a statute alleged to impair the obligation of a contract made before the statute existed"—and therefore coming within the terms of that section of the Judiciary Act allowing an appeal from the State court of last resort to the United States Supreme Court (sec. 709 Rev. Stat. U. S.)—"or else the writ of error was to a Circuit Court of the United States, bringing into the Supreme Court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State." In short, as it would seem, the changed construction may have impaired the obligation of the contract, and the Supreme Court might have so held if it could have assumed jurisdiction to try the question. But being an appeal from a State court, the jurisdiction conferred by the Judiciary Act did not extend to the case shown by the record.

The case of *Farrior v. N. E. Mortgage Co.*, 92 Ala. 176, well illustrates the principle that where rights have been acquired by contract, in reliance upon the construction placed upon a particular statute by the Supreme Court of the State, such construction becomes a part of the statute, just as if incorporated into its text, so far as such vested rights are concerned. In such case, no subsequent decision of the same court altering the former construction will be permitted to interfere with contract rights acquired in reliance thereon.

In that case the mortgagor had lent money to a married woman, and as security

had taken a mortgage on her statutory real estate, in reliance upon several previous decisions of the Supreme Court of the State construing the statute. After the execution of the mortgage, the Supreme Court reversed its previous rulings, and construed the statute as not empowering married women to execute mortgages. Encouraged by the latter ruling, the mortgagor resisted a foreclosure. The decision of the chancellor below, following the *former*, and not the latter, construction, was affirmed on appeal. The opinion contains a full review of the authorities and vindicates the conclusions of the court in the following vigorous language:

"Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to know the law better than the courts, or to know what the law will be at some future day. Any principle or rule which deprives a person of property acquired by him, or the benefit of a contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort, at the time of the transaction, and no fault can be imputed to him in the matter of the contract, unless it be held a fault not to foresee and provide against future alterations in the construction of the law, must be radically wrong. Such a principle or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the State. We hold the doctrine to be sound and firmly established by the decisions of the Supreme Court of the United States, and enunciated by many eminent text-writers, that rights to property, and the benefits of investments acquired by contract, in reliance upon a statute as construed by the Supreme Court of the State, and which were valid contracts under the statute as thus interpreted, when the contract or investments were made, cannot be annulled or divested by the subsequent decisions of the same court overruling the former decisions; that as to such contracts or investments, it will be held that the decisions which were in force when the contracts were made, had established a rule of property, upon which the parties had a right to rely, and that subsequent decisions cannot retract so as to impair rights acquired in good faith under a statute as construed by the former decision."

Reading this opinion in the light of the latest outgiving on the subject by the Supreme Court of the United States, above noticed, it would seem that the principle by which vested rights are thus protected against subsequent alterations of the law by the courts, is rather the common law principle of *stare decisis* than the constitutional prohibition against the impairment of the obligation of contracts.